FILED
JUN 29 1992
OFFICE OF THE CLERK

(2)

No. 91-1923

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

OAKWOOD PLAZA SHOPPING CENTER, INC., JOSEPH M. ARONOW and ANTHONY GALIOTO,

Petitioners,

v.

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, d/b/a FL&S ASSOCIATES,

Respondents.

On Petition For a Writ of Certiorari To The New York State Court of Appeals

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ROY A. POWELL
(Counsel of Record)
JEFFREY J. LUDWIKOWSKI
RICHARD P. BRESS
JONES, DAY, REAVIS & POGUE
500 Grant Street, 31st Floor
Pittsburgh, PA 15219
(412) 391-3939

Counsel for Respondents

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the New York State Court of Appeals correctly accorded full faith and credit to a Pennsylvania cognovit judgment based upon its conclusion, as a matter of law, that Petitioners had voluntarily, knowingly and intelligently waived their due process rights to notice and hearing prior to the entry of a civil judgment.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT 4

A. The Transaction 4

B. The Pennsylvania Proceedings 5

C. The New York Judgment 7

REASONS FOR DENYING THE WRIT 8

I. PETITIONERS' PRIMARY ARGUMENT IS BASED UPON ISSUES NOT PROPERLY PRESERVED BELOW 10

II. THE LOWER COURT'S DECISION IS CORRECT AND IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS 11

III. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THOSE OF OTHER COURTS 16

CONCLUSION 21

SUPPLEMENTAL APPENDIX CONTENTS

Page

SUPPLEMENTAL APPENDIX A

Notices of Entry of Judgments, Entered Against Petitioners in the Court of Common Pleas of Centre County, Pennsylvania, (Sept. 9, 1989) 1a

SUPPLEMENTAL APPENDIX B

Opinion and Order of the Court of Common Pleas of Centre County, Pennsylvania, Denying Petitioners' Motion To Open or Strike Judgment (July 14, 1989) 10a

SUPPLEMENTAL APPENDIX C

Opinion and Order of the Court of Common Pleas of Centre County, Pennsylvania, Dismissing Petitioners' Petitions To Stay Discovery in Aid of Execution and To Vacate Judgment For Lack of Subject Matter Jurisdiction (Oct. 18, 1989) 15a

SUPPLEMENTAL APPENDIX D

Opinion of the Superior Court of Pennsylvania, Affirming the Dismissal of Petitioners' Petitions to Stay Discovery in Aid of Execution and to Vacate Judgment, and Affirming the Order holding Petitioners in Contempt of Court (Jan. 15, 1991) 31a

TABLE OF AUTHORITIES

Page

Cases:

Boddie v. Connecticut, 401 U.S. 371 (1971) 17

Carlson v. Green, 446 U.S. 14 (1980) 10

Chittester v. LC-DC-F Employees of G.E. Fed. Credit Union, 384 F.Supp. 475 (W.D. Pa. 1974) 17, 19

D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972) ..... *passim*

FRG, Inc. v. Manley, 919 F.2d 850 (3d Cir. 1990) 8, 9, 14, 15, 20

Federman v. Pozsonyi, 529 A.2d 530 (Pa. Super. Ct. 1987) 17

Fuentes v. Shevin, 407 U.S. 67 (1972) 17, 19

Fiore v. Oakwood Plaza Shopping Ctr., Inc., 585 N.E.2d 364 (N.Y. 1991) 2

Fiore v. Oakwood Plaza Shopping Ctr., Inc., 565 N.Y.S.2d 799 (App. Div. 1991) 2

Fiore v. Oakwood Plaza Shopping Ctr., Inc., 585 A.2d 1012 (Pa. Super. Ct. 1991) 4

Illinois v. Gates, 462 U.S. 213 (1983) 10

TABLE OF AUTHORITIES (cont'd)

Page

Isbell v. County of Sonoma, 577 P.2d 188 (Cal. 1978), *cert. denied*, 439 U.S. 996 (1978) 8, 9, 18, 19

North Penn Consumer Discount Co. v. Schultz, 378 A.2d 1275 (Pa. Super. Ct. 1977) 17

Osmond v. Spence, 327 F.Supp. 1349 (D. Del. 1971), *vacated*, 405 U.S. 971 (1972), ... 19, 20

In re PCH Assocs., 122 B.R. 181 (Bankr. S.D.N.Y. 1990) 15, 20

Riehle v. Margolies, 279 U.S. 218 (1929) 11

Scott v. Danaher, 343 F.Supp. 1272 (N.D. Ill. 1972) 17, 19

Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) 17

In re Souders, 75 B.R. 427 (Bankr. E.D. Pa. 1987), *overruled by FRG, Inc. v. Manley*, 919 F.2d 850 (3d Cir. 1990) 19, 20

Swarb v. Lennox, 405 U.S. 191 (1972) ..... *passim*

TABLE OF AUTHORITIES (cont'd)

Page

Texas v. Mead, 465 U.S. 1041 (1984) 16

United States v. Johnston, 268 U.S. 220 (1925) 16

Virgin Islands Nat'l Bank v. Tropical Ventures, Inc., 358 F.Supp. 1203 (D.V.I. 1973) 19, 20

Yee v. City of Escondido, 112 S.Ct. 1522 (1992) 10

Statutes:

28 U.S.C. § 1257 10

Rules and Regulations:

Pa. R. Civ. P. 236(a)(1) 5, 18

Pa. R. Civ. P. 2950-2986 16

Pa. R. Civ. P. 2951 5

Pa. R. Civ. P. 2959 . . . . . 6, 18

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. 91-1923

OAKWOOD PLAZA SHOPPING CENTER, INC., JOSEPH M. ARONOW and ANTHONY GALIOTO,

Petitioners,

v.

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, d/b/a FL&S ASSOCIATES,

Respondents.

On Petition For A Writ Of Certiorari To The New York State Court Of Appeals

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Because Petitioners' recitation of the opinions below omits certain critical opinions, Respondents provide the

following full recitation and attach the omitted opinions in a Supplemental Appendix.[1]

The New York State Court of Appeals unanimously affirmed the order of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, which had affirmed (also unanimously) the order of the Supreme Court of the State of New York, County of New York. The court of appeals opinion dated and entered on December 23, 1991, is reproduced in the Petitioners' Appendix,[2] Pet. App. at 1a-13a, and has been published (*Fiore v. Oakwood Plaza Shopping Ctr., Inc.*, 585 N.E.2d 364 (N.Y. 1991), *reh'g denied*, 590 N.E.2d 253 (N.Y. 1992)).[3] The decision of the Supreme Court of the State of New York, Appellate Division, First Judicial Department unanimously affirming the trial court's decision is reproduced in the Petitioners' Appendix and has been published (*Fiore v. Oakwood Plaza Shopping Ctr., Inc.*, 565 N.Y.S.2d 799 (App. Div. 1991), *stay denied*, 578 N.E.2d 445 (N.Y. 1991)).[4] Pet. App. 15a-23a. The

---

[1]All of the material included in Respondents' Supplemental Appendix was presented to the New York State Court of Appeals as part of the Record on Appeal. All citations to "S.A." refer to the Supplemental Appendix to this Brief.

[2]All citations to "Pet. App." refer to the Appendix to the Petition filed by Petitioners at No. 91-1923.

[3]Petitioners' motion for reargument to the court of appeals was denied without dissent, in an unpublished order dated February 25, 1992. Pet. App. 14a.

[4]Petitioners' motion for clarification and reargument to the appellate division was denied, without dissent, in an unpublished order dated May 9, 1991. Pet. App. 24a-25a.

unreported opinion and order of the Supreme Court of the State of New York, County of New York is also reproduced in Petitioner's Appendix, Pet. App. 26a.

As noted above, the New York State Court of Appeals affirmed decisions of the lower New York courts granting full faith and credit to judgments entered against each of the Petitioners in the Court of Common Pleas of Centre County, Pennsylvania (the "Judgments"). The original Pennsylvania cognovit Judgments were entered on September 9, 1989 and notice of the entry of the Judgments was sent to each of the Petitioners by the clerk of courts (an office in the Pennsylvania court system known as the "Prothonotary"). S.A. 1a-9a. Subsequently, in an unpublished opinion and order dated July 14, 1989, the Court of Common Pleas of Centre County, Pennsylvania denied Petitioners' motion to open or strike the Judgments. S.A. 10a-14a. Although Petitioners failed to appeal that order in a timely manner, Petitioners Aronow and Galioto subsequently filed both a petition to vacate the Pennsylvania Judgments for lack of subject matter jurisdiction and a related petition to stay discovery in aid of execution on the Judgments. After an evidentiary hearing the trial court in Pennsylvania, in an unpublished opinion and order dated October 18, 1989, denied both the petition to vacate the trial court judgment and the petition to stay proceedings in aid of execution. The trial court, which had previously held Petitioners in contempt and issued sanctions against them based upon their repeated failure to respond to discovery or comply with the court's order, again held Petitioners in contempt and issued sanctions. S.A. 15a-30a. Petitioners appealed both orders, and in an opinion dated January 15, 1991, the Superior Court of Pennsylvania unanimously affirmed the trial court's orders denying Petitioners' motions to stay

discovery and to vacate, granting sanctions and holding Petitioners in contempt. The January 15, 1991, opinion is reproduced in the Supplemental Appendix and has been published (*Fiore v. Oakwood Plaza Shopping Ctr., Inc.*, 585 A.2d 1012 (Pa. Super. Ct. 1991)). S.A. 31a-54a.

STATEMENT

A. The Transaction

These proceedings relate to a transaction between Respondents and Petitioner Oakwood Plaza Shopping Center, Inc. ("Oakwood"), a Pennsylvania corporation in which Petitioners Joseph M. Aronow and Anthony Galioto are principals. By an Agreement of Sale dated February 14, 1986, Respondents agreed to sell approximately 14.8 acres of property located in Patton Township, Centre County, Pennsylvania, to State College Development Company, the predecessor-in-interest to Oakwood. Pursuant to the terms of that agreement, the full purchase price was to be paid in cash to Respondents at closing. However, at Petitioners' request, Respondents eventually agreed that Petitioners would pay Respondents the total sum of $700,000 at closing and that the balance of the purchase price would be secured by a purchase money mortgage and payable pursuant to a note. Accordingly, on December 23, 1986, Petitioner Oakwood executed a purchase money mortgage (the "Mortgage") in the amount of $1.1 million on the 14.8 acres of property, representing the balance due on the purchase of the property. Petitioners Oakwood, as well as Aronow and Galioto individually, executed a bond and warrant (the "Note") obligating Petitioners to pay Respondents $1.1 million with interest at 9% per annum. The Note included a cognovit judgment provision specifically authorizing the entry of

judgment against Petitioners by confession. Pet. App. 2a-3a.[5]

B. The Pennsylvania Proceedings

On September 9, 1988, after Petitioners had defaulted on their obligations under the Note, Respondents filed a complaint in confession of judgment as well as a praecipe to enter judgment against Oakwood, Aronow and Galioto. Pa. R. Civ. P. 2951. The Prothonotary of the Court of Common Pleas of Centre County, Pennsylvania entered Judgments against Petitioners, S.A. at 1a-9a, and immediately sent notices of entry of the Judgments and a copy of the complaint in confession of judgment to each of the Petitioners. Pa. R. Civ. P. 236(a)(1). On November 9, 1988, Respondents served discovery in aid of execution upon Petitioners. When Respondents received no responses, they filed a motion to compel discovery and for sanctions against Petitioners. On January 26, 1989, after serving notice upon Petitioners with respect to the hearing on Respondents' motion, the court of common pleas issued an order granting Respondents' Motion to Compel as well as imposing sanctions against Petitioners for failure to respond to Respondents' discovery. When Petitioners continued to defy the orders to comply with discovery, the court imposed additional sanctions.

Not until May 10, 1989, over eight months after the entry of the Judgments, did Petitioners first respond to the

---

[5]Contrary to the assertions in the Petition, the cognovit provision was not "buried" in the Note, but appears on page 3 of a three-page document several lines above Petitioners' signatures. It is the *only* provision, other than the execution language and signature lines, on that page of the Note. Pet. App. 11a-12a.

Pennsylvania action by filing a petition to open or strike the Judgments pursuant to Pa. R. Civ. P. 2959. Despite the doubtful timeliness of their motion, Petitioners were given an opportunity to present any and all defenses to the claims made by Respondents; Petitioners availed themselves of that opportunity, both in voluminous briefs and during a hearing in Pennsylvania in which Petitioners were represented by counsel.

In an order dated July 14, 1989, the court of common pleas denied the petition to open or strike the Judgments, S.A. at 10a-14a, determining, *inter alia*, that Petitioners could not present any valid defense on the merits. On September 5, 1989, 23 days after the expiration of the statutory 30-day appeal period, Petitioners filed a Notice of Appeal with the Superior Court of Pennsylvania from the order denying the petition to open or strike the Judgments. When Respondents moved to quash the Notice of Appeal as untimely, counsel for Petitioners withdrew the appeal.

Because Petitioners still had not complied with the court of common pleas' orders directing Petitioners to answer Respondents' discovery in aid of execution, the court once again held Petitioners in contempt and ordered Petitioners to respond within ten days and eventually assessed additional fines of $3,000 for every day that Petitioners remained in contempt.

At the hearing on the contempt issue, counsel for Petitioners presented both a petition to vacate the judgment for lack of subject matter jurisdictions and a petition to stay discovery in aid of execution. The petition to vacate was premised upon Petitioners' claim that a necessary party, a real estate broker in the transaction,

was not joined. On October 18, 1989, after considering the papers submitted by Petitioners and after a full hearing, the court dismissed both petitions. The order denying the petitions was ultimately affirmed by unanimous decision of the Pennsylvania Superior Court, as were the contempt citation and the sanctions imposed by the trial court. S.A. 31a-54a.

C. The New York Judgment

On or about January 20, 1989, having been unable to obtain Petitioners' cooperation on discovery, Respondents filed in the Supreme Court of the State of New York, County of New York, a motion for summary judgment in lieu of complaint, along with supporting papers. Petitioners filed opposition papers in response. After considering the voluminous affidavits and memoranda and hearing oral argument on the matter, the supreme court issued an opinion and corresponding order, granting Respondents' motion for summary judgment on the grounds, *inter alia*, that the Pennsylvania Judgments are valid and enforceable and are entitled to full faith and credit in New York. Judgment on the order was entered on September 8, 1990. On appeal, after extensive briefing and oral argument, the Supreme Court of the State of New York, Appellate Division, First Department unanimously affirmed the trial court's judgment. Petitioners appealed to the New York State Court of Appeals, which also held unanimously that the Pennsylvania Judgments were entitled to full faith and credit. This petition for certiorari followed.

REASONS FOR DENYING THE WRIT

Petitioners have demonstrated no basis for granting certiorari in this case. The decision of the court below is correct. The conclusion that the Pennsylvania Judgments are entitled to full faith and credit reached initially by the trial court was unanimously endorsed by a panel of four judges at the appellate division and by the entire seven-member court of appeals. There was not a single dissent at any level and reargument was denied when Petitioners urged the same arguments they now present to this Court. Contrary to Petitioners' arguments, there is no conflict between the court of appeals' decision and the decisions of other courts. Most significantly, the decision of the lower court does not conflict with, but instead faithfully implements, this Court's companion decisions in *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), and *Swarb v. Lennox*, 405 U.S. 191 (1972). Accordingly, review by this Court is not warranted and certiorari should be denied.

Petitioners apparently assert two arguments in support of their petition for writ of certiorari. First, Petitioners claim that the decision below conflicts with *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), and *FRG, Inc. v. Manley*, 919 F.2d 850 (3d Cir. 1990). According to Petitioners those cases require, where judgment has been entered by confession, that any finding of voluntary, knowing and intelligent waiver of notice and hearing prior to the entry of judgment be based solely upon "undisputed facts."

Second, Petitioners contend that the New York State Court of Appeals' opinion conflicts with an opinion of the Supreme Court of California, *Isbell v. County of Sonoma*,

577 P.2d 188 (Cal.), *cert. denied*, 439 U.S. 996 (1978), which Petitioners claim holds that signatories to a confessed judgment clause are constitutionally entitled to a hearing *prior to the entry of a judgment* to determine the voluntariness of their waiver.

Petitioners' arguments are neither meritorious nor remotely worthy of this Court's plenary consideration. With respect to their first contention, although the lower New York courts each found as a matter of law that Petitioners had been accorded their due process rights, Petitioners never before raised an argument regarding those courts' reliance upon "disputed facts." Accordingly, this Court should not (and perhaps may not) review that issue upon the instant petition. Further, upon close scrutiny the "disputed facts" argument is nothing more than a case-specific quibble over the wisdom of the New York courts' conclusions of law.

As to Petitioners' second argument, neither this Court in *Overmyer* and *Swarb*, nor the Third Circuit in *FRG*, established any constitutional requirement of a prejudgment hearing to determine the voluntariness of a waiver of due process rights pursuant to a confession of judgment provision. Numerous federal and state court cases argue against any such constitutional requirement, and to the extent that any language from *Isbell* is to the contrary, the California Supreme Court in *Isbell* was interpreting a California law substantially different from that existing in Pennsylvania.

I. PETITIONERS' PRIMARY ARGUMENT IS BASED UPON ISSUES NOT PROPERLY PRESERVED BELOW

Although Petitioners contended (only before the New York courts) that there was not sufficient evidence to support a finding of the voluntariness of their waiver, they never before raised the argument that a court may not determine voluntariness based upon "disputed facts" which they now assert before this Court. Only now, after the New York courts denied the relevance of Petitioners' factual assertions and determined that their waiver was voluntary, as a matter of law, have Petitioners released their sandbag and argued that it was inappropriate for the New York courts to make a finding of a valid waiver based upon allegedly "disputed facts."

"In reviewing the judgments of state courts under the jurisdictional grant of 28 U.S.C. § 1257, the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below." *Yee v. City of Escondido*, 112 S. Ct. 1522, 1531 (1992). Although this rule is prudential in cases arising from federal courts, *Carlson v. Green*, 446 U.S. 14, 17, n.2 (1980), where, as here, a case arises from state courts, the prohibition may be jurisdictional. *See Illinois v. Gates*, 462 U.S. 213, 218-220 (1983), *reh'g denied*, 463 U.S. 1237 (1983). Whether the rule is jurisdictional or prudential, this Court should deny the petition for writ of certiorari on Petitioners' "disputed facts" question because Petitioners had the opportunity but failed to raise or address the argument below.

II. THE LOWER COURT'S DECISION IS CORRECT AND IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS

The sole question before the New York courts in this case was whether the confessed Judgments entered in Pennsylvania were entitled to full faith and credit in New York. Specifically, review by the courts in New York was restricted to determining whether the rendering court had jurisdiction, an inquiry which includes due process considerations. *Riehle v. Margolies*, 279 U.S. 218, 225 (1929). The supreme court, the appellate division and the court of appeals each considered independently, and ultimately rejected, Petitioners' due process claims; based upon language of the operative documents and certain admitted facts (e.g., that Petitioners were sophisticated parties engaged in an arms-length transaction and that Petitioner Aronow is an attorney), the courts concluded that Petitioners had knowingly and voluntarily executed the confessed judgment provision.

In the companion cases of *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) and *Swarb v. Lennox*, 405 U.S. 191 (1972), this Court had occasion to determine the constitutionality of confessed judgment provisions identical to that at issue here. Although this Court held in *Overmyer*, that the facts of each case "are important," 405 U.S. at 187-88, it found that "*under appropriate circumstances*, a cognovit debtor may be held effectively and legally to have waived those rights he would possess if the document he signed had contained no cognovit provision," *Swarb*, 405 U.S. at 200 (emphasis added), and that the "standard for waiver in a corporate-property-right case of this kind is . . . that it be voluntary, knowing and

intelligently made." *Overmyer*, 405 U.S. at 185-186. That standard was fully satisfied here. Further, quoting from the lower court's opinion in *Swarb*, this Court stated that "it was not the federal court's function to dictate to Pennsylvania exactly what constitutes understanding waiver," *Swarb*, 405 U.S. at 199 (quoting *Swarb v. Lennox*, 314 F. Supp. 1091, 1100 (E.D. Pa. 1970) (per curiam) (three-judge panel)), expressly leaving it to the courts of Pennsylvania, or in this case New York, to determine what facts are sufficient to establish as a matter of law that a debtor has voluntarily waived its rights.[6]

This Court, quoting the district court's opinion in *Swarb*, stated that "where the debtor is an attorney, an affidavit to that effect may be all that is necessary to prove understanding." *Id.* The Court implied in *Swarb* that the then-existing Pennsylvania cognovit judgment proceeding may be unconstitutional as applied to low income, uneducated individuals who signed boilerplate residential loan documents containing cognovit provisions. Petitioners' attempt to portray a conflict between the New York Court of Appeals' opinion in this case and this Court's opinion in *Overmyer* must fail because, regardless of Petitioners' pleas to the contrary, the facts in this case, as presented to the courts in Pennsylvania and New York, are similar to those in *Overmyer*. Like *Overmyer*, the

---

[6]In situations where the debtor raises the issue of voluntariness of waiver and evidence on the circumstances of the waiver is clearly lacking and insufficient for the court to make a determination, a separate evidentiary hearing on that issue may be advisable. However, that is not the case here. Petitioners failed to raise the waiver issue before the Pennsylvania courts and the New York courts concluded that the undisputed facts were sufficient as a matter of law to demonstrate the knowing, voluntary and intelligent nature of Petitioners' waiver.

parties here are sophisticated business entities, well educated and involved in a commercial transaction dealing in large sums of money. Moreover, at least in the person of Petitioner Aronow, Petitioners were represented by counsel.[7] Finally, Petitioners negotiated the drafting of the contract between the parties to such a degree that they required an extensive addendum to be added to the contract.

The changes made to the agreement demonstrate that Petitioners had bargaining power in the negotiation process. For example, contrary to the original terms that required full payment at closing, Petitioners were able to obtain the property based upon a down payment to Respondents with a promise, secured by a mortgage, that the balance of the purchase price would be paid in the future. Respondents were, in return, compensated for this concession through the provisions in the Note. Those provisions included a clear and conspicuous confession of judgment clause located just above Petitioners' signatures. Pet. App. 11a-12a.

The above-cited facts clearly demonstrate that sufficient undisputed evidence before the New York Court of Appeals established, as a matter of law, that Petitioners had knowingly, voluntarily and intelligently waived their

---

[7] It is undisputed that Mr. Aronow, one of the debtors in this case, is an attorney licensed to practice law in the State of New York. The mere fact that Mr. Aronow is not licensed to practice law in Pennsylvania is irrelevant because Petitioner Aronow's legal training establishes that he has the ability to read and understand legal provisions in a document. It is an inability to understand the meaning of contractual provisions which concerned this Court in *Overmyer*, and especially in *Swarb*.

rights to prejudgment notice and hearing. As the New York Court of Appeals stated "[t]he bald assertion that these sophisticated defendants, entering upon a significant transaction, did not read the document cannot excuse their legal obligation or overcome the substantial evidence of waiver." Pet. App. 12a. This Court in *Overmyer* noted that the confession of judgment procedure serves a "proper and useful purpose in the commercial world." *Overmyer*, 405 U.S. at 188. The instant case is just one example of the intended usefulness of confessed judgments.

The opinion of the United States Court of Appeals for the Third Circuit in *FRG, Inc. v. Manley*, 919 F.2d 850 (3d Cir. 1990), is not to the contrary. Although in *FRG* "the facts [were] not in dispute", *id.* at 852, that was not a point critical to the court's holding. The Third Circuit in *FRG* expressly followed this Court's opinion in *Overmyer* when it stated that this Court "recognized that in *some* circumstances a knowing debtor could be held to have effectively and legally waived due process rights with respect to notice in litigation which it would otherwise possess absent a confession of judgment clause." *Id.* at 856 (emphasis added). As the New York Court of Appeals did here, the Third Circuit in *FRG* merely determined that under the circumstances before it, there was a clear showing of voluntary waiver. The Third Circuit did not hold that a voluntary waiver could *only* be found in circumstances where all of the facts are undisputed. Furthermore, like the New York Court of Appeals' determination that the instant parties were "sophisticated" -- a finding Petitioners condemn as a "mere conclusion" -- the court in *FRG* asserted that "the debtors *. . . seem[ed] to be business entities with sophisticated*

principals, knowledgeable in business matters." *Id.* at 857 (emphasis added). *See* Pet. App. 11a-12a.

The United States Bankruptcy Court for the Southern District of New York also had occasion to analyze the Pennsylvania cognovit judgment statutes under the Due Process Clause of the United States Constitution. *In re PCH Assocs.*, 122 B.R. 181 (Bankr. S.D.N.Y. 1990). *PCH Associates* held that the Pennsylvania statutes were consistent with due process requirements, as set forth by this Court in *Overmyer*, "where *ample evidence* was shown that the debtor voluntarily, knowingly and intelligently waived his rights to notice and a hearing prior to the entry of a civil judgment." *Id.* at 192 (emphasis added). *PCH Associates* contained no suggestion that a determination could only be made where all relevant facts are undisputed, but instead, consistent with this Court's opinion in *Overmyer*, held only that there must be "*ample evidence*" of voluntary, knowing and intelligent waiver. That is precisely the finding which the New York Court of Appeals made in this case.[8]

Finally, stripped of its rhetoric and false assertions of conflict, Petitioners' problem with the court of appeals' decision is not that the court held it permissible to rely upon disputed facts, but rather, according to Petitioners, that the court may inadvertently have relied upon certain disputed facts. Although Respondents believe that the court of appeals properly found a valid waiver based upon undisputed facts and exhibits, the determination whether

---

[8]In another part of the opinion, the court's formulation of the standard was that there need only be "*sufficient evidence* to establish waiver." *PCH Assocs.*, 122 B.R. at 194 (emphasis added).

the court below engaged in impermissible appellate fact finding in violation of New York law is not an endeavor worthy of this Court's time and attention. It is well established that the Supreme Court "does not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.).

III. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THOSE OF OTHER COURTS

Petitioners assert that the Pennsylvania confessed judgment procedures, Pa. R. Civ. P. 2950-2986, are facially invalid because they do not provide a debtor with an opportunity for a hearing *prior* to the entry of the confessed judgment to determine whether the debtor has validly waived its rights to prejudgment notice and an opportunity to be heard. Petitioners assert that there is a conflict between the New York Court of Appeals and other courts on this issue. The argument Petitioners seek to fashion in order to justify consideration of their petition is neither valid nor worthy of this Court's review.

Initially, Petitioners' argument flies directly in the face of *Overmyer* and *Swarb*, in which this Court held that the Ohio and Pennsylvania confessed judgment statutes, which contain no pre-judgment hearing provisions, were not *per se* unconstitutional. Moreover, Petitioners' argument that due process requires notice and an opportunity to be heard *prior* to the entry of a confessed judgment is contrary to established law.

In the seminal decision on the timing requirements of the Due Process Clause, this Court held "that the right to notice and an opportunity to be heard must be granted *at a meaningful time*." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (emphasis added). A "meaningful time" means prior to the deprivation of a significant property interest not prior to the entry of judgment. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (Due process has a "root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.") (emphasis in original); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 339-40 (1969) (holding that the taking of property by a garnishment proceeding, absent notice and prior hearing, violates due process); *Chittester v. LC-DC-F Employees of G.E. Fed. Credit Union*, 384 F. Supp. 475, 479 (W.D. Pa. 1974) ("We have always believed that the 'deprivation' of a significant property interest would occur at a judicial sale on execution of a debtor's property . . . ."); *Scott v. Danaher*, 343 F. Supp. 1272 (N.D. Ill. 1972).

Consistent with the above-cited cases, Pennsylvania courts have held a meaningful time to be prior to *execution* on property, not prior to the entry of judgment on the debt. *See, e.g., Federman v. Pozsonyi*, 529 A.2d 530 (Pa. Super. Ct. 1987); *North Penn Consumer Discount Co. v. Schultz*, 378 A.2d 1275, 1278 (Pa. Super. Ct. 1977); *accord Chittester*, 384 F. Supp. at 479 (holding that "the meaningful time for the opportunity to be heard on any defense to a confession of judgment is prior to any proceeding to begin to *execute*, on the judgment") (emphasis added). Petitioners cannot contend that any of their property was executed upon prior to their

opportunity to be heard in Pennsylvania.[9] Indeed, to this date, Respondents have been unable to execute on any of Petitioners' property. Accordingly, Petitioners have not suffered any deprivation of property. Moreover, though Petitioners had and exercised a post-judgment opportunity to be heard in the Pennsylvania courts, they failed to raise the due process arguments that they now seek to present.

Petitioners have cited several cases, some in a footnote, which they believe support their argument that they were entitled to a hearing prior to the entry of the confessed judgment. None is on point. Initially, Petitioners rely upon the California Supreme Court's opinion in *Isbell v. County of Sonoma*, 577 P.2d 188 (Cal.), *cert. denied*, 439 U.S. 966 (1978). However, the California Supreme Court in *Isbell* was analyzing an entirely different statutory procedure. The *Isbell* Court, in concluding that a hearing prior to entry of judgment was required, contrasted the California scheme to the Ohio scheme involved in *Overmyer*, by emphasizing that, unlike Ohio, California provided *no notice of entry of judgment* and severely restricted the grounds for post-judgment attack. *Id.* at 195. Since the Pennsylvania confessed judgment scheme is

---

[9] Notice of the entry of the judgment must be sent to the debtor by the Prothonotary. Pa. R. Civ. P. 236(a)(1). Pursuant to Pa. R. Civ. P. 2959, debtors have the right in Pennsylvania to petition to open or strike a confessed judgment. Upon filing a petition to open or strike, the debtor is entitled to an evidentiary hearing and to have the judgment opened "[i]f evidence is produced which in a jury trial would require the issues to be submitted to the jury." Pa. R. Civ. P. 2959(e). All defenses and objections that are not raised are waived. Pa. R. Civ. P. 2959(c). It cannot be gainsaid that Petitioners had notice and an opportunity to be heard and actually availed themselves of that opportunity.

identical to the Ohio scheme approved by this Court in *Overmyer* in these respects, Petitioners' citation to *Isbell* is inapposite.[10]

Petitioners also cite several other cases to support their argument of entitlement to a prejudgment hearing. *See Virgin Islands Nat'l Bank v. Tropical Ventures, Inc.*, 358 F. Supp. 1203 (D.V.I. 1973); *Scott v. Danaher*, 343 F. Supp. 1272 (N.D. Ill. 1972); *Osmond v. Spence*, 327 F. Supp. 1349 (D. Del. 1971), *vacated*, 405 U.S. 971 (1972);[11] *In re*

---

[10]Although certain passages in *Isbell* imply a constitutional requirement for a pre-judgment hearing, in light of the court's alternative bases for the decision such passages are properly viewed as *dicta*.

[11]Petitioners failed to point out that the *Osmond v. Spence* opinion was vacated by this Court. On remand, the district court in Delaware held that, in light of the companion holdings in *Overmyer* and *Swarb*, due process as it relates to confessed judgments entered prior to the "first opinion and in accordance with a Delaware commercial practice of ancient origin and long standing, requires only that *before an execution is issued*, or upon application by a judgment debtor, the judgment creditors be required to establish that the individual against whom the judgment on a cognovit note was entered effectively waived his constitutional rights by executing the note." *Osmond v. Spence*, 359 F. Supp. at 127 (emphasis added). This holding is consistent with the positions taken by courts on the Pennsylvania confession of judgment procedure and also with all due process cases related to this issue, which hold that due process only requires that the debtor be given an opportunity for a hearing at a meaningful time, which translates to any time before execution. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67 (1972); *Chittester v. LC-DC-F Employees of G.E. Fed. Credit Union*, 384 F. Supp. 475 (W.D. Pa. 1974).

Souders, 75 B.R. 427 (Bankr. E.D. Pa. 1987), *overruled by FRG, Inc. v. Manley*, 919 F.2d 850, 856 (3d Cir. 1990).[12]

In response, as the Bankruptcy Court for the Southern District of New York stated:

> While the ultimate common goal of [those cases is] laudable, they are not controlling here. First, given that the [United States] Supreme Court has already spoken to [and affirmed] the constitutionality of the Pennsylvania statutory scheme regarding confessed judgments, the *Souders* decision cannot be given any weight to the extent that it attempts to overrule the Supreme Court. Second, the *Osmond*, *Virgin Islands* and *Souders* decisions demonstrate the discretionary powers of courts to address the waiver issue at a separate judicial hearing *where there is a deficiency of facts before the court*.

PCH Assocs., 122 B.R. at 193-94 (footnote omitted) (emphasis added).

In sum, because Pennsylvania's statutory scheme provides an opportunity for a hearing at a constitutionally meaningful time, i.e., prior to execution, and in the absence of any direct conflict on the issue, the question whether the Petitioners were constitutionally entitled to a pre-judgment hearing is simply answered in the negative and does not otherwise merit this Court's plenary consideration.

---

[12]In its ruling in *FRG*, the Third Circuit expressly rejected the *Souders* opinion to the extent that it required a prejudgment hearing on voluntariness of waiver.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Roy A. Powell
Jeffrey J. Ludwikowski
Richard P. Bress
Jones, Day, Reavis & Pogue
500 Grant Street, 31st Floor
Pittsburgh, PA 15219
(412) 391-3939

Counsel for Respondents

June 29, 1992

SUPPLEMENTAL APPENDICES

SUPPLEMENTAL APPENDIX A

IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, t/a FL&S ASSOCIATES,	) CIVIL DIVISION) G.D. No.) Issue No.)
Plaintiffs,	) NOTICE OF ENTRY OF JUDGMENT) Filed on behalf of
v.	) Plaintiffs)
OAKWOOD PLAZA SHOPPING CENTER, INC., a corporation, JOSEPH M. ARONOW, individually and ANTHONY GALIOTO, individually,	) Counsel of Record) for this Party:) Roy A. Powell, Esq) PA I.D. #37487) Rose, Schmidt,) Hasley & DiSalle
Defendants.	) Firm #043) 900 Oliver Building) Pittsburgh, PA) 15222-5369) (412) 434-8600

CERTIFIED from the records as entered and filed in this office
21 day of Sept. A.D. 1988
/s/ David L. Immel
Prothonotary and Clerk of the Court

IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, t/a FL&S ASSOCIATES,	)	
Plaintiffs,	)	
v.	)	
	)	G.D. No.____
OAKWOOD PLAZA SHOPPING CENTER, INC., a corporation, JOSEPH M. ARONOW, individually and ANTHONY GALIOTO, individually,	)	
Defendants.	)	

NOTICE OF ENTRY OF JUDGMENT

TO: Oakwood Plaza Shopping Center, Inc.
1901 E. College Avenue
State College, PA 16802

TAKE NOTICE that a Judgment in the amount of One Million, Two Hundred Sixteen Thousand, One Hundred Forty-Five and 00/100 Dollars ($1,216,145.00) has been entered in favor of Leonard S. Fiore, Sr., Leonard S. Fiore, Jr., Richard P. Fiore, Harry K. Sickler and Thomas C. Large t/a FL&S Associates and against

Oakwood Plaza Shopping Center, Inc. in the Court of Common Pleas of Centre County, Pennsylvania, on the __ day of _____ of 1988.

_____

_____, Prothonotary

IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, t/a FL&S ASSOCIATES,	CIVIL DIVISION G.D. No. 88-1989 Issue No.
Plaintiffs,	NOTICE OF ENTRY OF JUDGMENT Filed on behalf of Plaintiffs
v.	
OAKWOOD PLAZA SHOPPING CENTER, INC., a corporation, JOSEPH M. ARONOW, individually and ANTHONY GALIOTO, individually,	Counsel of Record for this Party: Roy A. Powell, Esq PA I.D. #37487 Rose, Schmidt, Hasley & DiSalle Firm #043 900 Oliver Building Pittsburgh, PA 15222-5369 (412) 434-8600
Defendants.	

CERTIFIED from the records as entered and filed in this office
21 day of Sept. A.D. 1988
/s/ David L. Immel
Prothonotary and Clerk of the Court

IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, t/a FL&S ASSOCIATES,	)	
Plaintiffs,	)	
v.	)	
OAKWOOD PLAZA SHOPPING CENTER, INC., a corporation, JOSEPH M. ARONOW, individually and ANTHONY GALIOTO, individually,	)	G.D. No. 88-1989
Defendants.	)	

NOTICE OF ENTRY OF JUDGMENT

TO: Joseph M. Aronow
14th Floor
300 Madison Avenue
New York, NY 10017

TAKE NOTICE that a Judgment in the amount of One Million, Two Hundred Sixteen Thousand, One Hundred Forty-Five and 00/100 Dollars ($1,216,145.00) has been entered in favor of Leonard S. Fiore, Sr., Leonard S. Fiore, Jr., Richard P. Fiore, Harry K. Sickler

and Thomas C. Large t/a FL&S Associates and against Joseph M. Aronow in the Court of Common Pleas of Centre County, Pennsylvania, on the 9th day of September of 1988.

_____

_____, Prothonotary

IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, t/a FL&S ASSOCIATES,	) CIVIL DIVISION) G.D. No. 88-1989) Issue No.)
Plaintiffs,	) NOTICE OF ENTRY OF JUDGMENT) Filed on behalf of
v.	) Plaintiffs)
OAKWOOD PLAZA SHOPPING CENTER, INC., a corporation, JOSEPH M. ARONOW, individually and ANTHONY GALIOTO, individually,	) Counsel of Record) for this Party:) Roy A. Powell, Esq) PA I.D. #37487) Rose, Schmidt,
Defendants.	) Hasley & DiSalle) Firm #043) 900 Oliver Building) Pittsburgh, PA) 15222-5369) (412) 434-8600

CERTIFIED from the records as entered and filed in this office
21 day of Sept. A.D. 1988
/s/ David L. Immel
Prothonotary and Clerk of the Court

IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, t/a FL&S ASSOCIATES,	)	
Plaintiffs,	)	
v.	)	
	)	G.D. No. 88-1989
OAKWOOD PLAZA SHOPPING CENTER, INC., a corporation, JOSEPH M. ARONOW, individually and ANTHONY GALIOTO, individually,	)	
Defendants.	)	

NOTICE OF ENTRY OF JUDGMENT

TO: Anthony Galioto
7000 71st Place
New York, NY 11385

TAKE NOTICE that a Judgment in the amount of One Million, Two Hundred Sixteen Thousand, One Hundred Forty-Five and 00/100 Dollars ($1,216,145.00) has been entered in favor of Leonard S. Fiore, Sr., Leonard S. Fiore, Jr., Richard P. Fiore, Harry K. Sickler and Thomas C. Large t/a FL&S Associates and against

Anthony Galioto in the Court of Common Pleas of Centre County, Pennsylvania, on the 9th day of September of 1988.

_____

_____, Prothonotary

SUPPLEMENTAL APPENDIX B

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA CIVIL ACTION-LAW

LEONARD S. FIORE, SR., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 88-1989
	)	
OAKWOOD PLAZA SHOPPING CENTER, INC., et al.,	)	
	)	
	)	
Defendants.	)	

OPINION AND ORDER

Grine, J.

This matter is before the Court upon Plaintiffs' Complaint in Confession of Judgment, Plaintiffs' Confession of Judgment Where Action Commenced by Complaint, Motion of Defendants to Open or Strike the Judgment, and Motion to Strike Defendants' Petition to Open or Strike Judgment and Response in Opposition to Petition to Open or Strike Judgment. The hearing date for the last two of these motions was June 15, 1989. With respect to these two, Defendants' motion is denied, based on the following.

FACTUAL BACKGROUND

This case arises from a transaction between Plaintiffs and Oakwood Plaza Shopping Center, Inc. By Agreement of Sale, as amended by a Rider, Plaintiffs agreed to sell a parcel of property of approximately 14.8 acres located in Patton Township, Centre County, Pennsylvania, to Defendants' predecessor (State College Development Co.), at a price of $600,000.00 in cash with the balance of the purchase price secured by a purchase money mortgage.

Oakwood executed an indenture that constitutes a purchase money mortgage in the amount of $1.1 million dollars on the 14.8 acres of property. Additionally, Oakwood, as well as Petitioners (Anthony Galioto and Joseph Aronow) individually, executed a bond and warrant obligating Oakwood and Petitioners to pay Plaintiffs $1.1 million dollars with interest at 9% per annum.

Upon receipt of the cash portion of the purchase price, Plaintiffs delivered the necessary deeds for recording to the escrow agent, All necessary documents were delivered to Petitioners. Oakwood and Petitioners failed to make any improvements to the property, defaulted on their obligations and failed to make payments required under the terms of the Bond and Warrant and the purchase money mortgage. Litigation ensued, and Plaintiffs obtained judgments against Oakwood, Aronow and Galioto. After Plaintiffs served many additional documents upon Petitioners and Oakwood over the course of almost 8 months, without response from Petitioners, Petitioners filed the instant Petition to Open or Strike.

DISCUSSION

I. OPENING THE JUDGMENT

A three-prong test is applied to determine whether a judgment should be opened. "[T]he petition to open must be (1) promptly filed, (2) state an adequate excuse why a timely answer was not filed, and (3) show a meritorious defense. *All three criteria must be met." Cross v. 50th Ward Comm. Ambulance Co.*, 365 Pa. Super. 74, 528 A.2d 1369, 1371 (1987) (emphasis added, citations omitted). "[C]ourts have found routinely that a petitioner's failure, to meet any prong of the three-part test is fatal to obtaining the relief sought." *Id.* (citations omitted). Because the following discussion finds the absence of a meritorious defense, the first and second prongs need not be considered.

The defenses alleged by Petitioners, and the reasons for their invalidity, are the following:

1. Failure of conditions precedent

Petitioners contend that they have a defense on the merits based upon a lack of consideration which allegedly arises from a failure of several conditions precedent. Specifically, Petitioners contend that Plaintiffs were required to build a perimeter road around the subject property, obtain building permits for the proposed shopping center construction, and install sewer and water facilities.

There is no lack of consideration in this case since Petitioners have received and are presently in possession of the subject property. Moreover, even if the conditions

Petitioners allege were factual, they constitute nothing more than a breach of a separate contractual obligation to Oakwood and do not affect the validity of the note or the underlying debt.

2. Incomplete note

Petitioners contend that Plaintiffs cannot prevail because they are seeking to recover on an incomplete or altered note and therefore no amount is due. The only plausible grounds alleged for such incompleteness is that the building permit was an element of the note necessary to determine the purchase price of the property, and that the addendum was omitted. This argument fails because Petitioners' debt is calculated based upon documents of record without the necessity of using building permits.

3. Fraud

Fraud must be pleaded with specificity. Pa.R.Civ.P. 1019(b). Thus "the pleadings must adequately explain the nature of the claim to the opposing party so as to permit him to prepare a defense. . ." *In re Estate of Schofield*, 505 Pa. 95 477 A.2d 473, 477 (1984); *Bata v. Central-Penn National Bank of Philadelphia*, 423 Pa. 373, 224 A.2d 174, 179 (1966), cert. denied, 386 U.S. 1007 (1967). Petitioners' conclusory allegations set forth in paragraphs 25 and 26 fail to fulfill this requirement. Petitioners fail to set forth, among other things, who made such allegations, when such allegations were made, how Petitioners relied upon such allegations, and how Petitioners were allegedly damaged by such reliance.

II. STRIKING THE JUDGMENT

A motion to strike is "subject to a defense akin to laches and therefore a motion to strike *must be made within a reasonable time of the entry of judgment." Triangle Bldg. Supplies & Lumber Co. v. Zerman*, 242 Pa. Super. 315, 363 A.2d 1287, 1290 (1976) (emphasis added); *Nixon v. Nixon*, 329 Pa. 256, 198 A.2d 154 (1938). Petitioners' delay of almost nine months, between the date that they were notified of the entry of judgment and the date that they brought this petition, was unreasonable.

Petitioners fail to offer any explanation or excuse for such a delay. In addition, Defendants' effort to disprove the applicability of laches, Brief [In Support of the Motion to Open or Strike], p. 5, citing *James v. Silverstein*, 224 Pa. Super. 489, 306 A.2d 910 (1973), fails because Plaintiffs have been and will continue to be prejudiced in their attempt to collect on their judgments in the event that Aronow and Galioto are permitted to continue to delay this proceeding.

ORDER

AND NOW, this 14 day of July, 1989, Defendants' Motion to Open or Strike the Judgment is DENIED.

BY THE COURT:

/s/David Grine
Judge

SUPPLEMENTAL APPENDIX C

**IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA
CIVIL DIVISION**

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, t/a FL&S ASSOCIATES,	)	
Plaintiffs,	)	
v.	)	
OAKWOOD PLAZA SHOPPING CENTER, INC., a corporation, and ANTHONY GALIOTO, an individual and JOSEPH ARONOW, an individual,	)	No. 88-1989
Defendants.	)	

OPINION AND ORDER

Grine, J.

This matter is before the Court on Defendants' Oakwood Plaza Shopping Center, Inc., Joseph M. Aronow and Anthony J. Galioto's Petition for Rule to Show Cause Why Discovery in Aid of Execution Should Not be Stayed; on Defendants' Aronow and Galioto's Petition for Rule to Show Cause Why Judgment Should Not be Vacated for

Lack of Subject Matter Jurisdiction; and on the hearing on each Rule on October 10, 1989, at 4:00 P.M. For the following reasons, the Court dismisses the Rule to Show Cause Why Discovery in Aid of Execution Should Not Be Stayed, and the Rule to Show Cause Why Judgment Should Not Be Vacated For Lack of Subject Matter Jurisdiction.

STATEMENT OF PROCEDURAL AND FACTUAL BACKGROUND

The Petition for a Rule to Show Cause Why Judgment Should Not be Vacated for Lack of Subject Matter Jurisdiction, filed by Defendants Joseph Aronow and Anthony Galioto (the "Defendants") is another procedural tactic which Defendants are attempting to employ to avoid the effect of the validly entered judgment in this case that is now over one year old. After failing to comply with the process and orders of this Court for almost nine months, Defendants then sought the aid of this Court to avoid the effect of the September 9, 1988, judgment. After all parties had an opportunity to present full argument, affidavits and legal memoranda on the issue of whether the judgment should be opened, this Court issued an Order denying the Petition to Open and found that the Defendants could not satisfy the elements of the test applicable to a petition to open judgment. In order to avoid the effect of that judgment, Defendants have ignored all discovery served upon them by FL&S Associates, violated Orders issued by this Court and employed other procedural maneuvers. Because Defendants have been unsuccessful in persuading this Court to adopt any of their unmeritorious arguments and inasmuch as any other claims and defenses that were not previously raised are now waived, they now caption this petition as one to

vacate for lack of subject matter jurisdiction, in an apparent attempt to claim that this belated defense is neither waived nor barred by the doctrine of res judicata.

This Court dismissed Defendants' Petition to Vacate the Judgment on the merits for several reasons which are set forth in this Opinion. However, due to Defendants' prior filing of a Notice of Appeal of this matter to the Pennsylvania Superior Court, this Court does not presently have jurisdiction to hear this issue, and on this ground as well, the rule to show cause and the Petition to Vacate are dismissed.

This case arises as a result of a transaction between Plaintiffs and Oakwood Plaza Shopping Center, Inc., ("Oakwood") a Pennsylvania corporation of which Defendants are the principals. By agreement of sale dated July 14, 1986, Plaintiffs agreed to sell a parcel of property of approximately 14.8 acres located in Patton Township, Centre County, Pennsylvania, to State College Development Co. ("Oakwood's predecessor"). Mr. Saul Waxman acted as the real estate broker in that transaction. Initially, pursuant to the terms of the agreement of sale, the full price of the property was to be paid in cash to Plaintiffs at settlement. At Defendants' request, Plaintiffs eventually agreed that, at settlement, Defendants would pay to Plaintiffs the total sum of $700,000.00 and the balance of the purchase price would be secured by a purchase money mortgage that would be subordinated only to land, development and construction financing.

As a result of that agreement, Mr. Waxman agreed that a portion of his commission applicable to the unpaid balance would be paid at such times as the balance of the

agreed purchase price was paid. Mr. Waxman and Plaintiffs agreed that FL&S' Associates' contractual obligation to pay Mr. Waxman the balance of his commission would be secured by Plaintiffs assignment of a six percent (6%) interest in the mortgage to Mr. Waxman. While a small portion of the mortgage was assigned to Mr. Waxman as security for Plaintiffs' contingent obligation to pay Mr. Waxman additional broker's commissions, Mr. Waxman does not, and never did have any interest in the note (the bond and warrant) that is the subject of this proceeding.

On or about December 23, 1986, Oakwood executed an indenture that is identified as and constitutes a purchase money mortgage in the amount of $1.1 million dollars on 14.8 acres of property. Additionally, Oakwood, as well as Defendants individually, executed a bond and warrant obligating Oakwood and Defendants to pay Plaintiffs $1.1 million dollars with interest at 9% per annum. Mr. Waxman was assigned no interest in the bond and warrant. This obligation was secured by the mortgage on the 14.8 acre parcel of property.

Oakwood and Defendants failed to make any improvements to the property, defaulted on their obligations and failed to make payments required under the terms of both the bond and warrant and purchase money mortgage. On September 9, 1988, the Plaintiffs filed a Complaint in Confession of Judgment as well as a Praecipe to Enter Judgment against Oakwood, Aronow and Galioto. On the same day the Prothonotary of the court of Commo Pleas of Centre County, Pennsylvania, entered a final judgment against Defendants and Oakwood and sent Notice of Entry of Judgment and a copy of the Complaint in Confession of Judgment to

Defendants. On November 9, 1988, Plaintiffs served discovery in aid of execution upon Defendants as well as Oakwood by certified and first class mail. On January 6, 1989, not having received responses to their discovery, Plaintiffs filed a Motion to Compel Discovery and for Sanctions against Defendants as well as Oakwood. On January 26, 1989, this Court issued its Order granting Plaintiffs' Motion to Compel and issuing sanctions for failure to respond to discovery filed and served on Defendants.

On May 10, 1989, Defendants filed their Petition to Open or Strike the Judgment. After Plaintiffs responded, and after having heard oral argument on the matter, this Court issued its Order of July 14, 1989, denying Defendants' Petition to Open or Strike the Judgment. On September 5, 1989, 53 days after this Court's Order denying the Petition to Open or Strike the Judgment was entered, Defendants filed a Notice of Appeal of that Order with the Pennsylvania Superior Court. Plaintiffs have filed an Application to Quash the Notice of Appeal filed by Defendants as untimely, and that Application is currently pending before the Superior Court.

On September 18, 1989, this Court issued a Rule to Show Cause Why Defendants Should Not be Held in Contempt for failure to comply with this Court's Order of January 26, 1989, which directed Defendants to respond to Plaintiffs' discovery in aid of execution. On October 2, 1989, after a hearing on the matter, this Court held Defendants in criminal contempt for failure to respond to Plaintiffs' discovery in aid of execution and, pursuant to that determination, fined Defendants $3,000.00. Additionally, this Court ordered that Defendants would have 10 days to respond to the discovery in aid of

execution, otherwise Defendants would be held in civil contempt and fined $1,000.00 per day for every day from the 10th to the 20th day that Defendants did not respond to the discovery, and $3,000.00 per day for every day that they did not respond after the 20th day.

DISCUSSION

I. VACATING JUDGMENT FOR LACK OF SUBJECT MATTER JURISDICTION

A. Appeal Creates Lack of Jurisdiction to Vacate the Judgment or Prior Orders.

"Once a party takes an appeal to an appellate court, the trial court is divested of jurisdiction over the subject matter until further order of the appellate court reinstating jurisdiction." *Ingram v. Dovertown Estates. Inc.*, 307 Pa. Super. 22, 452 A.2d 884, 886 (1983); *see also Oak Lane Shopping Center v. Flame*, 264 Pa. Super. 9, 398 A.2d 721, 723 (1979), Pa. Rule of Appellate Procedure 1701.

Once an appeal has been taken "it is error for the lower court to modify, [vacate] or reverse an order from which an appeal has been taken. This has been the common law rule at least since *Ewing v. Thompson*, 43 Pa. 372 (1862), and has been consistently followed." *Corace v. Balint*, 418 Pa. 262, 210 A.2d 882, 889 (1965); see generally *Bartle v. Bartle*, 304 Pa. Super. 348, 450 A.2d 715 (1982).

Since Defendants filed their Notice of Appeal on September 5, 1989, the Court no longer has jurisdiction to vacate the judgment.

B. Defendants' Contention that Saul Waxman is an Indispensable Party to this Action is Without Merit.

Even if the Court determined that it would otherwise have jurisdiction to hear this matter, it must deny Defendants' Petition to Vacate Judgment for Lack of Subject Matter Jurisdiction because Mr. Saul Waxman is not an indispensable party.

1. Defendants Have Brought This Petition In The Wrong Action.

The present action relates solely to the bond and warrant, or note, executed by Oakwood as well as Aronow and Galioto individually. Judgment was entered on that note in September 1988. Contrary to Defendants' assertion at paragraph 7 of their Petition, Mr. Waxman has no pecuniary interest in the note, is not a party to that note, nor was he assigned any interest in the note by FL&S Associates. FL&S Associates, the Plaintiffs herein, hold the only interest in that note.

A separate action concerns the mortgage in which Mr. Waxman does have an interest.

2. Saul Waxman Has No Joint Interest In The Subject Matter Of This Action Which Would Be Prejudiced By Proceeding To Judgment In His Absence.

Mr. Waxman is not an indispensable party since complete relief can be accorded among those already party to the action without his presence, and his absence will not impair or impede his ability to protect his interest, nor will it leave Defendants at risk of incurring double,

multiple, or inconsistent obligations. *Gardner v. County of Allegheny*, 382 Pa. 88, 114 A.2d 491, 495 (1955). Mr. Waxman's interest in the mortgage was assigned by FL&S Associates solely to secure the payment of funds arising from the separate contractual relationship between Mr. Waxman and FL&S Associates.

Because Mr. Waxman's interest is in the mortgage and arises out of FL&S Associates interest, and since Mr; Waxman's right to the payment of any additional funds relates to FL&S Associates' contractual obligation to him for additional broker's commissions, Mr. Waxman has no direct claim against the Defendants under the bond and warrant or otherwise. Not only is his presence not essential for granting relief in this matter, but it is wholly irrelevant and inappropriate in this action.

Furthermore, Mr. Waxman is not an indispensable party to this action since his interest is in the mortgage and not the bond and warrant; and since that interest is not joint for purposes of Pa.R.Civ.P. 2227(a) ("persons having only a joint interest in the subject matter of an action must be joined on the same side as plaintiffs or defendants"). The addendum to the mortgage clearly states that FL&S has *assigned* to Saul Waxman a 6% interest in the mortgage. It does not create a joint interest in the mortgage between the parties nor does it render Mr. Waxman an indispensable party to the present proceedings.

3. The Law Will Imply Consent To A Confession Of Judgment When The Judgment Benefits The Non-Consenting Party.

Mr. Waxman, the real estate broker in this case, is by operation of law an agent for FL&S Associates. Mr. Waxman's interest in the mortgage arises solely out of a contractual agreement between Mr. Waxman and Plaintiffs, to which Defendants are not a party, whereby Plaintiffs assigned a 6% interest in the mortgage securing their obligation to Mr. Waxman. Consequently, even assuming Defendants' argument that Mr. Waxman's consent is a prerequisite to Plaintiffs' maintenance of this action, since this action will directly benefit Mr. Waxman by assuring payment of his remaining brokers commission, the law presumes he consented.

In view of the foregoing, there is neither legal nor factual bases for the argument that Mr. Waxman is an indispensable party. Furthermore, "the rule is that if the merits of the case may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach the result." *Gardner v. county of Allegheny*, 382 Pa, 88, 114 A.2d at 496. In the instant action Mr. Waxman's presence is neither necessary nor appropriate and will serve no purpose whatever.

C. Even If Mr. Waxman Were An Indispensable Party, The Proper Remedy In This Case Is Not To Vacate The Judgment But Merely To Order Mr. Waxman Added As A Party.

Even if Defendants could reasonably contend that Mr. Waxman is an indispensable party, the judgment

previously entered in this action should not be vacated. Pursuant to Pennsylvania Rule of Civil Procedure 2227, a joint obligee should not bring an action alone to recover his proportionate share under a contract. "If he does sue alone, however, the name of the other obligee may be added by amendment, even after the testimony is closed, so long as the defendant is not prejudiced by the delay in adding the additional obligee." Goodrich-Amram 2d Sec. 2227(a); 2 at p. 384. Defendant in the present action fails to allege such prejudice.

"The action should not be dismissed because of the omission of even an 'indispensable' party." Goodrich Amram 2d Sec. 2232(c):1 citing *Beck v. Kilroy*, 1 Dist. S. Co. Rep. 2d 777 (1954). "The new party may be added at any stage in the action. It may be done during the trial or even after the testimony is closed." Goodrich-Amram 2d at Sec. 2232 (c):1.3 at p. 565.

D. Defendants Are Incorrect In Asserting That The Bond Warrant (the "Note") And The Mortgage Should Be Read Together As One Instrument.

The three cases which Defendants cite as support for their proposition that the note and mortgage should be read as one instrument in order to determine the intention of the parties are inapplicable to the instant action. *See e.g. Housing Mortgage Corp. v. Allied Construction. Inc.*, 374 Pa. 312, 319, 97 A.2d 802, 805 (953); *Colbassani v. Society of Christopher Columbus*, 159 Pa. Super. 414, 417, 48 A.2d 106, 107 (1946); *Williamsport National Bank v. First National Bank of Williamsport*, 334 Pa. 130, 5 A.2d 228 (1939). All of these cases are legally inapposite to the instant case and further, are factually distinguishable.

All three of the cases cited by Defendants involve a single transaction whereby a single debtor pledged to pay debts to one or more creditors. These debts were all secured by mortgages on a single parcel of property given by a single debtor directly to the creditors. The rights of all the creditors attached in the same transaction. In these cases, the courts correctly held that the debt instruments and mortgages should all be read together in order to determine the proper interpretation of a contract arising from one continuous transaction.

In the instant case, the facts are vastly different from those involved in the cases above. In fact, the present case involves two separate transactions in which two separate debtors pledged differing interests to separate creditors who obtained their rights at different times. The first transaction consisted of Defendants' pledge to Plaintiffs to pay a sum, which is reflected in the note, in return for the conveyance of the 14.8 acre parcel in Patton Township. As security for this pledge, Defendants granted Plaintiffs a mortgage on the subject property. In this transaction, Defendants are the debtors and Plaintiffs are the creditors. A totally separate transaction, which did not involve Defendants, took place between Plaintiffs and Mr. Saul Waxman. That transaction consisted of a contract between Plaintiffs and Mr. Waxman whereby Plaintiffs agreed to pay Mr. Waxman a broker's fee for his services as a real estate broker. As security for their debt to Mr. Waxman, Plaintiffs assigned a 6% interest in the mortgage which they received from Defendants. In the second transaction, Plaintiffs are the debtors and Mr. Waxman is the creditor.

The cases cited by Defendants simply do not apply in the instant action. It is readily apparent that Mr.

Waxman's interest in the mortgage is not coextensive with any interests which arise as a result of the note, since those interests are not a result of the same transaction and do not involve the same parties. Furthermore, the intention of the parties to the addendul to the mortgage, namely FL&S Associates and Saul Waxman, must be determined without reference to the note because the note does not involve the transaction between FL&S Associates and Saul Waxman. In fact, Mr. Waxman has testified that it was never his intention or belief that he had an interest in the note.

II. STAY OF DISCOVERY IN AID OF EXECUTION

A. Defendants Are Not Entitled To A Stay Of Discovery Based Upon Their Petition For A Rule To Show Cause Why Judgment Should Not Be Vacated For Lack Of Subject Matter Jurisdiction.

Defendants' Petition for a Rule to Show Cause why Justment Should Not be Vacated for Lack of Subject Matter Jurisdiction cannot form the basis for a stay of discovery in this matter because the Court dismisses that Rule herein for the reasons stated above.

B. Defendants Have Failed To Properly Perfect Their Appeal Or Supersedeas And Stay In The Present Action.

Defendants contend that because they have filed a Notice of Appeal, discovery in aid of execution should be stayed. However, Defendants have failed to comply with the Pa. Rules of Appellate Procedure in order to properly

perfect the appeal or a supersedeas to stay discovery in aid of execution in this matter.

It is well-established that a prerequisite to the issuance of a supersedeas is the existence of a valid appeal. *See generally, Wilkinson v. United Parcel Service*, 158 Pa. Super. 34, 43 A.2d 414, 415 (1945). Only Defendants Aronow and Galioto have filed a Notice of Appeal. However, even Aronow and Galioto's Notice of Appeal of this Court's Order of July 14, 1989, was not filed until September 5, 1989, 53 days after the entry of the Order. Accordingly, the Notice of Appeal is untimely and cannot support the requested stay. Even if Defendants appeal were timely, it neither operates as nor entitles Defendants to, a stay of discovery in aid of execution.

Although Rule 1701 of the Pennsylvania Rules of Appellate Procedure states that the trial court no longer has jurisdiction in a matter after appeal has been taken, the exceptions to that rule provide that the trial court may continue to "enforce any order entered in the matter, unless the effect of the order has been *superseded* as prescribed in this chapter." This Court, therefore, retains jurisdiction to enforce its prior order of January 26, 1989, directing Defendants to respond to discovery in aid of execution, absent an appropriate supersedeas issued by the Superior Court. This Court is empowered to enforce its orders, even after Notice of Appeal, by means of contempt. *See Rosenberg v. Holy Redeemper Hosp.*, 351 Pa. Super, 399, 506 A.2d 408, 414 (1986).

Defendants contend that since they have filed a Notice of Appeal from this Court's Order of July 14, 1989, denying their Petition to Open or Strike the Judgment, discovery in aid of execution should be stayed in this

matter. However, pursuant to the Pennsylvania Rules of Appellate Procedure, Defendants are only entitled to a stay of post-judgment proceedings if they "ask for and have done those things necessary to obtain it." *Shinn v. Stemler*, 159 Pa. Super. 129, 47 A.2d 294, 295 (1946). The Rules of Appellate Procedure require that Defendants properly perfect an application for supersedeas and file a bond with the appellate court in order to stay judgment or any post-judgment proceedings ancillary to judgment. *See. e.g.* Pennsylvania Rules of Appellate Procedure 1731-1738. The mere filing of an appeal does not automatically function as a supersedeas and stay the trial court's powers. *Shinn v. Stemler*, 47 A.2d at 295 (Defendant appealed Order denying Petition to Oepn Judgment. Court held Judgment not stayed by appeal). Defendants have neither requested a supersedeas nor filed any bond with the Superior Court.

In addition, even if they had filed an appropriate bond and requested a supersedeas from the Superior Court, Defendants are only entitled to a stay or supersedeas from the appellate court "if the appeal appears to present a question which is meritorious, not frivolous; [and] if any detriment to interested parties resulting from a stay would be less than the harm resulting from a denial of it. . ." *Allets, Inc. v. Penn Tp. Bd. of sup'rs.*, 67 Pa. Commw. 326, 447 A.2d 329. 330 (1982). The Pennsylvania Superme Court has gone so far as to require that Defendants "*make a strong showing* that [they are] likely to prevaid on the merits," *before* they will be granted a stay. *Pa. Pub. Util. Com'n v. Process Gas Consumers*, 502 Pa. 545, 467 A.2d 805, 808-9 (1983) (emphasis added). Defendants cannot establish either of these requirements.

On review, the appellate courts will not disturb a trial court's determination on a petition to open or strike absent a clear and manifest abuse of discretion. *Walters v. Harleysville Mut. Cas. Co.*, 417 Pa. 438, 207 A.2d 852 (1965). This Court's Order of July 14, 1989, denying Defendants' Petition to Open or Strike amply demonstrates that Defendants' appeal is entirely unmeritorious and, on appeal, Defendants have virtually no change of success on the merits. As this Court determined, Defendants failed to demonstrate that they could fulfill the "meritorious defense" factors required to justify opening or striking a judgment. [See this Court's Order of July 14, 1989]. Accordingly, under any analysis, but especially under the no abuse of discretion standard applicable to Defendants' appeal, there is little likelihood that Defendants will prevail on appeal.

Inasmuch as the appeal filed by Aronow and Galioto is not only untimely, but is also without merit, a stay in this case would further prejudice Plaintiffs' attempts to execute on the judgment. The resulting detriment to Plaintiffs would be without reason and serve no legitimate purpose for Defendants' benefit, other than to continue to delay the enforcement of Plaintiffs' rights. Therefore, even if Defendants had properly requested a supersedeas and filed the appropriate security with the Court, they would not be entitled to a stay of discovery, or of any other ancillary post-judgment proceeding of this Court.

ORDER

AND NOW, this 18th day of October, 1989, it is ORDERED that the Rule to Show Cause Why Discovery in Aid of Execution Should Not be Stayed, and the Rule

to Show Cause Why Judgment Should Not be Vacated for Lack of Subject Matter Jurisdiction are DISMISSED.

BY COURT:

/s/David Grine
Judge

SUPPLEMENTAL APPENDIX D

LEONARD S. FIORE, SR., ET AL. Appellee	) IN THE
	) SUPERIOR COURT
	) OF
v.	) PENNSYLVANIA
	)
OAKWOOD PLAZA SHOPPING CENTER, INC., JOSEPH H. ARONOW, ANTHONY GALIOTO, Appellants	) No. 659
	) Harrisburg 1989
	)
	)
LEONARD S. FIORE, SR., ET AL. Appellee	)
	) No. 660
v.	) Harrisburg 1989
	)
OAKWOOD PLAZA SHOPPING CENTER, INC., JOSEPH H. ARONOW, ANTHONY GALIOTO, Appellants	)
	)
	)

APPEAL FROM THE ORDERS OF THE COURT OF COMMON PLEAS OF CENTRE COUNTY, CIVIL DIVISION AT NO. 88-1989

BEFORE: POPOVICH, HUDOCK and MONTGOMERY, JJ.

OPINION BY POPOVICH, J.: FILED: JAN. 15, 1991

This case involves an appeal from the October 2 and 18, 1989, orders of the Court of Common Pleas of Centre County dismissing the defendants/appellants' rules to show cause and holding them in contempt of court. We affirm.

To appreciate the result we reach in the case, a detailed account of the events leading to the present appeal is necessary. Toward that end, the record indicates that Saul Waxman, a real estate broker in central Pennsylvania, was approached by a Doctor David Hadden in regard to property he wished to sell in Centre County. Mr. Waxman, at all times thereafter, represented the partnership of FL&S Associates.[1]

Waxman made contact with Joseph Aronow and Anthony Galioto, both New York residents, who showed interest in purchasing the land in question and constructing a shopping center on the site.

The parties had agreed, at least at first, that the purchase price was to be paid in cash. However, Mr. Aronow altered his position and wanted a subordinated purchase money mortgage to be issued. To this, FL&S agreed without objection. To accommodate Mr. Waxman, the FL&S group offered to secure the payment of the balance of his commission (he had been paid $27,000.00 and could have been owed, depending on the square footage of the center when completed, up to $70,000.00) by assigning him a 6% interest in the mortgage FL&S held on the property sold to the defendants as their security for the remaining monies to be paid.

To validate the sale of the property between the parties, an indenture with Bond and Warrant, along with an accompanying addendum, were executed by the

---

[1]FL&S Associates consisted of Leonard S. Fiore, Sr., Leonard S. Fiore, Jr., Richard R. Fiore, Thomas C. Large and Harry K. Sickler, t/a FL&S Associates. This same cadre make up the party-plaintiffs/appellees.

defendants and FL&S. Both the Bond and Warrant and Mortgage documents contained confession of judgment clauses authorizing acceleration of payment of the $1.1 million purchase price plus attorney's fees upon default of the prescribed monthly payments of principal and interest.

Upon failure of the defendants to make payments as required by the various documents, the plaintiffs filed a complaint in confession of judgment demanding a total of $1,216,145.00 (in principal, attorney's commission and 9% interest as of August 26, 1989) from the defendants for "default[ing] . . . under the terms of . . . [a] Bond and Warrant . . . to make agreed upon payments" calculated as $9.00 per square feet times total interior square footage on permit for building less $700,000.00 but not less than $750,000.00. The document was dated December 23, 1986, and executed by Anthony Galioto, as President of Oakwood Plaza Shopping Center, Inc., and individually as did Joseph M. Aronow. The $700,000.00 figure, however, did not appear anywhere in the "form" Bond and Warrant document. Rather, attached thereto was an "addendum" in which the defendants agreed to:

> . . . pay to Obligee [plaintiffs] one-half of the entire principal amount of the obligation secured hereby[*] The entire principal then be due and payable on or before four months after the Commencement date; and **such principal amount is calculated as nine ($9.00) Dollars/per square foot times total interior square footage on permit for building less seven hundred thousand dollars but not less than $750,000.00.*[2]

---

[2]The underscored language was added to the "addendum" and appears in hand-written form in the margin of the document.

By notice of even date, the prothonotary of Centre County entered judgments in favor of the plaintiffs and against each of the defendants, separately. Pursuant to Pa.R.Civ.P. 4006, 4009 and 4019, the plaintiffs requested of the defendants that they produce various documents and respond to interrogatories for the discovery of assets to aid in the execution of the judgments.

On January 6, 1989, the plaintiffs filed Motions to Compel and For Sanctions for failure of the defendants to answer interrogatories and/or produce documents. On May 10, 1989, a petition to open or strike judgment was filed by Joseph M. Aronow and Anthony Galioto. It was alleged therein that, on December 16, 1986, the plaintiffs had agreed to sell and the defendants to buy a parcel of land. In furtherance of the sale, the succeeding instruments were signed: (a) agreement of sale with rider; (b) purchase money mortgage with addendum; and (c) warrant with addendum.

It was the contention of the defendants that the plaintiffs had obligated themselves to "obtain all necessary approvals from authorities having jurisdiction over the site for use . . . as a shopping center . . . and to obtain building permits." Paragraph 10. Further, the defendants averred that the plaintiffs, by way of agreement, were to provide: (a) all municipal water and sanitary sewers; and (b) a road around the perimeter of the site for ingress and egress with water, storm and sanitary sewer pipe lines. Paragraphs 12 and 15.

The plaintiffs were held to have failed to comply with any of the "condition[s] precedent to the payments to become due under the Note." Paragraph 24. Because the addendum (which was recorded with the mortgage) took

precedence over the Note, and the former was not attached to the Note when confession of judgment was made, it was the defendants' position that the Note was "not collectible" and unenforceable for the "[P]laintiffs' fail[ure]" to give material consideration as they promised as an inducement to obtain the Note. Paragraphs 35, 37 and 39. The defendants also argued that, because the principal balance due to the plaintiffs under the addendum to the Note was "based on a formula using the total interior square footage as shown by the building permit," the complaint's failure to set forth the square footage permitted by the building permit, or that it was ever issued, justified striking the confession of judgment. Paragraphs 42 and 43.

At this point, it requires that we recite the substance of the Agreement of Sale signed by the interested parties hereto and dated July 14, 1986, with respect to the 14.8 acres of land situate in Patton Township, Centre County. In Paragraph 1, the parties provided that, as a condition to the contract, the plaintiffs/sellers:

> . . . shall obtain approval by all necessary authorities having jurisdiction over the site for use of the site as a Shopping Center or Strip of no less than 161,200 square feet and no more than 200,000 square feet ground coverage for interior commercial space useable for retail shopping.
>
> That said approval shall include provision for municipal water, municipal sanitary sewers to within 50 feet of the site, and acceptable storm sewers or collection pools, all with the right to install, hook-up and utilize at no additional cost or expense for construction other than normal hook-up fees,

connecting pipes of up to 50 feet and on-site storm pipes and pool constriction.

As for the purchase price, it was to be computed based on the square footage of the shopping center to be used for commercial space times $9.00. Paragraph 5. Affixed to the Agreement of Sale was a Rider that took precedence over the Agreement of Sale and required that the plaintiffs/sellers: "present all prepared engineering and architectural studies to local authorities for approval of the exact site plan required by [defendants/]Purchaser." Paragraph 9.

A motion to strike the petition of Joseph M. Aronow and a response thereto were filed. In the latter instrument, the plaintiffs averred that judgment was entered properly based on the defendants' default. The plaintiffs denied that the Agreement of Sale and Rider "were pursuant to any offer" by the plaintiffs. Paragraph 8. And, the allegations in Paragraphs 10, 12, 21 and 27 of the defendants' petition were claimed to be "misstatements of said agreement." Also, the plaintiffs denied not obtaining all necessary approvals and refuted the contention that they had any obligation to obtain building permits. Paragraphs 11, 15, 16, 22, 25, 30, 39, 40 and 43. Lastly, the plaintiffs admitted that the terms of the addendum were incorporated as part of the Bond and Warrant, see Paragraphs 29 and 32, but it was denied that the "Bond and Warrant" was incomplete, altered or failed to include the addendum. Paragraphs 31, 34 and 35. As for the lack of consideration on the obligation to provide a road for ingress and egress, this was denied as well by the plaintiffs. Paragraphs 15 and 39.

In support of the motion in opposition to the petition to open or strike judgment, the affidavits of David Sweetland and Harry K. Sickler, Jr. were submitted by the plaintiffs.

Sweetland's affidavit indicated that, between 1981 and 1986, he was township engineer for Patton Township, Centre County, and was familiar with all regulations required in connection with land development in that area. As is applicable here, he was involved with the "planning for and obtaining approvals in connection with the Oakwood Plaza Shopping Center Development." Paragraph 4. Sweetland also averred that the defendants had taken court action in the Supreme Court of New York, County of New York. There, Sweetland submitted responses, under oath, in support of his Motion For Summary Judgment In Lieu Of Complaint And In Opposition To Defendants' Cross Motions.

Sweetland's affidavit, prepared for presentment before and submitted to the Supreme Court of New York to buttress his motion for summary judgment, indicated that he was hired to perform engineering and consulting services for Joseph M. Aronow and Anthony Galioto with regard to the construction of a shopping center on the 14.8-acre site in Patton Township, Centre County. The architectural and buildings plans were to be prepared by CDA International, Inc. for Aronow and Galioto. Paragraph 9. It was never Sweetland's understanding that FL&S Associates was responsible for or in any way involved with consulting or architectural services relating to the planning and design of the Oakwood Plaza Shopping Center Project. Paragraph 11. .

Sweetland, pursuant to his affidavit, acknowledged advising Aronow, for whom he had prepared a preliminary General Site Plan, "both orally and in writing that submission of the [Final] Site Plan to Patton Township for approval was the next step required in order to progress the development of the project. Any subsequent approvals or design work could not proceed without the submission of the [Final] Site Plan for approval." Paragraph 22. This never came to pass, and Sweetland was never paid for his services to Aronow and Galioto.

According to Sweetland, increasing the interior retail space from 161,200 square feet to 193,382 square feet was calculated by him and provided to the defendants. And, as far as Sweetland was concerned, "no question that further work toward obtaining additional approvals and building permits required decisions and authorization to proceed by Oakwood, Aronow and/or Galioto[, and not anyone involved with FL&S Associates]." Paragraph 29, Exhibit 2.

The second affidavit of record is that of Harry K. Sickler, Jr., a partner of FL&S Associates. He also prepared a similar affidavit in support of Motion For Summary Judgment In Lieu Of Complaint And In opposition To Defendants' Cross Motion filed in the Supreme Court of the State of New York.[3] He adopted the affidavit as a response to the defendants' Petition to Open or Strike Judgment. It was alleged therein that the

---

[3]The motion before the New York court is based upon facts and claims for relief that are identical to those contained in the two Pennsylvania actions that have proceeded to final judgment. Paragraph 43.

defendants,[4] by agreement dated July 14, 1986, had contracted to buy a 14.8-acre site of land in Patton Township from the plaintiffs. Subsequently, the two parties agreed upon a rider to the contract which changed the purchase price. Also, on December 23, 1986, the defendants executed an indenture ("Purchase Money Mortgage") in the amount of $1.1 million for the 14.8 acreage of land. Additionally, the defendants executed a Bond and Warrant obligating the three to pay FL&S Associates $1.1 million with interest at 9% per annum.

Once the Deed and Mortgage were recorded, the defendants defaulted on their obligations and failed to pay as required under the Bond and Warrant and the Purchase Money Mortgage. As a result, on October 31, 1988, FL&S Associates instituted a Complaint in Mortgage Foreclosure in Centre County (No. 88-2392). The defendants failed to respond. Thereafter, in accordance with Pa.R.Civ.P. 237.1, FL&S Associates provided notice of its intention to take a default judgment in the event the defendants did not respond to the complaint. Notice was delivered on November 15, 1988. By December 5, 1988, the defendants had filed no response. Accordingly, pursuant to Pa.R.Civ.P. 1037(b), a judgment in the amount of $1,287,713.88 was entered in favor of FL&S Associates and against the defendants by the Court of Common Pleas of Centre County.

Notice of entry of the judgement was provided to the defendants on December 5, 1988, and a writ of execution

---

[4]State College Development Company was initially involved in the purchase of the realty. However, it assigned to Oakwood the agreement of sale. Paragraph 19, Sickler's Affidavit.

was issued on the judgment on the same day by the court. No action was taken by the defendants. By separate complaint filed September 9, 1988, FL&S Associates commenced an action on the Bond and Warrant against the defendants. The complaint on the Bond and Warrant was based upon the identical facts giving rise to the complaint in mortgage foreclosure.

Notification of the entry of the judgment in favor of the plaintiffs in the amount of $1,216,145.00 plus interest was sent to each of the defendants on September 9, 1988. On November 9, 1988, under Pa.R.Civ.P. 3117, 4406 and 4009, FL&S Associates served a request for discovery in aid of execution on each of the defendants. The defendants failed to respond, and, as a result, FL&S filed and served on the defendants a motion to compel and for sanctions for the defendants' failure to respond to discovery. The court granted the motion after argument for which the defendants did not respond or appear. In fact, no action was taken by the defendants since the entry of the judgment, and the situation remains status quo.

It was Sickler's contention, via his affidavit, that the defendants' claims of FL&S failing to meet certain of its obligations were based on "unsupported affidavits" submitted in the motion for summary judgment in lieu of complaint before the court in New York, and the same "are provably false." Paragraph 45, Sickler's Affidavit. For example, to Galioto's affidavit that Paragraph 1 of the Agreement of Sale made the plaintiffs responsible for obtaining on-site improvements, it was FL&S Associates' position that the "necessary approvals . . . were obtained. (Documentation of the approvals are included in the Affidavit of David Sweetland.)." Likewise, the approved number of square feet was increased by the zoning board

to 193,382 square feet of retail space on the site as well as FL&S providing an irrevocable letter of credit in the amount of $83,000.00 to guarantee the performance of the public improvements which included a "roadway."

On the question of engineering and architectural studies, the plaintiffs asserted that what plans existed were presented to the local authorities for approval. Since no "final site plan" had been completed by the defendants, FL&S Associates could not have been requested "to present what did not exist." Finally, FL&S Associates, through Sickler's affidavit, stated that the Agreement of Sale and Rider (contrary to the defendants' interpretation) required that "all engineering and architectural work was defendants' responsibility and that defendants could request FL&S Associates to submit defendants' designs for approval. No such request was ever made[.]" To the same effect, Sickler's affidavit alleged that Aronow's affidavit was "filled with misstatements and fabrications" regarding the obtaining of building permits, providing water and sanitary sewers, storm sewers and collection pools, and installing a roadway around the perimeter of the site by the defendants.

As far as FL&S Associates was concerned, it had "clearly performed its obligations by providing for the extension of utilities and the completion of the roadway." Similarly, FL&S was of the mind that the obtaining of building permits was not a *sine qua non* to any payments under the Bond and Warrant and Mortgage.

On June 15, 1989, a hearing was conducted to resolve the various complaints and motions filed by the respective parties regarding the confession of judgment and the attempt by the defendants to open or strike its entry.

Thereafter, the court issued an opinion and order dated July 14, 1989, denying the motion to open or strike judgment, one of the grounds being that the defendants' delay of almost 9 months in contesting the confession of judgment was "unreasonable . . . [and the defendants] fail[ed] to offer any explanation or excuse for such a delay." The July 14th order was reduced to judgment and an appeal to this Court followed.

By September 15, 1989, the plaintiffs had filed motions seeking to hold the defendants in contempt of court and impose sanctions for failure to answer interrogatories in aid of execution of the confession of judgment. Further, the plaintiffs argued that the defendants' appeal was "untimely" and a motion to quash would be filed by FL&S Associates. In response, the defendants alleged that their appeal was timely, that they were not showing contempt for the court and wished to have an adjudication on the merits of the case to establish that the plaintiffs were not entitled to recovery.

In particular, the defendants averred that the action should be vacated for the lack of subject matter jurisdiction for the plaintiffs' failure to join a necessary party-plaintiff, i.e., Saul Waxman, the individual who acted as a real estate broker in facilitating the transaction leading to the Agreement of Sale. Paragraph 6. And, because the addendum provided that no action could be instituted under the mortgage without written consent of Waxman or the purchase of his interest by the plaintiffs, the failure of either event to occur denied the court subject matter jurisdiction to entertain the suit. Paragraphs 13, 14 and 20.

On October 11, 1989,[5] the plaintiffs presented an answer to the defendants' petition seeking to vacate the judgment. They argued that the cause of action against the defendants was initiated in accordance with the terms of the Bond and Warrant, that the payment of 6% interest to Waxman was secured by the mortgage and was separate and distinct from the Bond and Warrant. Further, the plaintiffs asserted that the mortgage was not the subject of the proceeding, Waxman had no interest in the Bond and Warrant, and, although Waxman's consent was not obtained prior to commencing the suit under the Bond and Warrant:

> . . . he ha[d] specifically consented to the actions commenced by FL&S Associates, including the instant proceeding, as well as the proceeding to foreclose on the mortgage filed at No. 88-2392. Paragraph 11.

Finally, the plaintiffs urged that the defendants had misrepresented repeatedly, under oath, the facts relating to the proceedings before the court and continued to do so both in the petition and in the affidavits attached thereto. Paragraph 17.

---

[5]In the interim, i.e., on October 2, 1989, the court held the defendants in contempt and directed each to pay $3,000.00 for failing to comply with its January 26, 1989, order. On October 10, 1989, the defendants filed a motion for reconsideration of the October 2nd order on the ground that, inter alia, they were guilty of no more than indirect criminal contempt warranting, under 42 Pa.C.S. § 4136(b), a maximum fine of $100.00. By order dated November 13, 1989, the fine was reduced to $100.00 plus reasonable attorney's fees to be determined at a later date.

On October 10, 1989, a hearing was conducted on the motions for a stay of discovery and to vacate judgment. At that time, counsel for the defendants told the court that he had discontinued, that morning, the appeal to Superior Court and presented the court with a copy of the praecipe for discontinuance to establish record evidence that there was no case pending before the Superior Court so as to deprive it of the "ability to act" on defendants' petition.[6]

The fundamental argument to vacate judgment was stated by the defendants to be "a relatively simple and straight forward argument that the judgment . . . [was] void . . . for failure of the plaintiff[s] to join as a party in the proceedings an indispensable party. That indispensable [party was] Saul Waxman." The remedy for this procedural misstep, so stated the defendants, was to dismiss the action. And, the fact that Waxman may have consented to the plaintiffs' suit after its institution was of no moment.

Counsel for the plaintiffs was permitted to present the position of his clients. In doing so, he observed that the initial argument that the court lacked jurisdiction, given the withdrawal of the appeal to Superior Court by the defendants, was a moot point. The simple issue, as viewed by counsel for the plaintiffs, was one in which the defendants were confusing the "Bond and Warrant" with the "Mortgage" – two separate documents which the

---

[6]Our review of the record evidences the inclusion of no exhibit of the withdrawal of the appeal to Superior Court being attached to the stenographer's notes, despite the fact that there is an indexing system referring to the defendants/petitioners' exhibit # 1.

defendants believed should be construed together in resolving the case.

Counsel for the plaintiffs asserted that Waxman was not a party to the "Bond and Warrant" and had no interest in such a document. Thus, the case should focus on the resolution of the "Bond and Warrant" matter since the only instrument in which Waxman had an interest was the "Mortgage", an action in which judgment had been entered by default almost a year prior to the present suit in which no appeal or petition to open had been filed. The mortgage foreclosure action was continuing to proceed, so stated counsel for the plaintiffs.

Additional argument was heard from both counsel. Waxman testified that he agreed to allow the plaintiffs to proceed with their lawsuit against the defendants after its commencement. It was Waxman's understanding that he was to look to the plaintiffs to recoup his broker's commission on the real estate transaction. He had no claim against the defendants.

On October 18, 1989, the court issued an opinion and order dismissing the defendants' Rule To Show Cause. Once this order, along with the contempt order and fine of October 2, 1989, was reduced to judgment, an appeal to this Court ensued challenging both adjudications.

The first issue posed for our consideration concerns the finding by the court below, and endorsed by the plaintiffs, that the defendants' filing a notice of appeal on September 5, 1989, to Superior Court from the order of July 14, 1989, denying their petition to open or strike judgment divested the court of jurisdiction to vacate the judgment.

The law is settled in this Commonwealth that once a party takes an appeal to an appellate court, the trial court is divested of jurisdiction over the subject matter and "may no longer proceed further in the matter." Pa.R.App.P. 1701(a); *Corace v. Balint*, 418 Pa. 262, 210 A.2d 882 (1965); *Commonwealth v. Burkett*, 352 Pa.Super. 350, 507 A.2d 1266 (1986), allocatur denied 9/10/87. Instantly, an examination of the record discounts any divestature of jurisdiction in the court below.

For instance, we had attorneys for both parties acknowledging at the October 10, 1989, hearing that there had been a discontinuance of the plaintiffs' previous appeal of the July 14, 1989, order denying the plaintiffs' petition to open or strike judgment. This appeal was docketed at No. 545 HBG 89 by the prothonotary for the Superior Court in Harrisburg. A copy of the praecipe discontinuing the No. 545 HBG 89 appeal was presented, at least ostensibly, to the court below during the October 10, 1989, hearing[7] and a *copy* of the same was included in the appellants' "supplemental Record On Appeal" at lb-3b.

We would note at this juncture that the presentment of a *copy* of the praecipe discontinuing the previous appeal to afford the court below authority to entertain the issues to be decided is *not* consistent with this Court's disallowance of the use of appellate briefs as a substitute for evidence in the record generated and compiled at the trial level. See, e.g., *McCormick v. Allegheny General Hospital*, __ Pa.Super. __ , 527 A.2d 1028 (1987).

---

[7]See note 6, supra.

It is the obligation of the appellant to make sure that the record forwarded to an appellate court contains those documents necessary to allow a complete and judicious assessment of the issues raised on appeal. It is not for an appellate court to scour the dockets of the various prothonotaries to confirm or deny allegations of any party to an appeal. See, e.g., *Commonwealth v. Santana*, 321 Pa.Super. 299, 468 A.2d 488 (1983).

Nonetheless, even though we have the authority to remand this case for a supplementation of the record on this issue of "discontinuance" of a prior appeal at No. 545 HBG 89, see Pa.R.App.P. 1926, we have taken the liberty, in the interest of judicial economy, to determine that the original appeal of the July 14, 1989, order was withdrawn and discontinued by the appellants on October 10, 1989, the very date inquiry was made into why the judgment earlier entered in the case (on July 14, 1989) should not be vacated and why discovery in aid of execution should not be stayed. Accordingly, we find that the court was not deprived of jurisdiction under this theory of the case.

The second issue proffered by the appellants attributes the court below with error in holding that Waxman was not an indispensable party, and, therefore, a vacation of the confession of judgment was warranted.

It does not go unnoticed that the appellants do not assail the confession of judgment under the traditional tripartite test to determine whether a judgment should be

opened.[8] See *Cross v. 50th Ward Comm. Ambulance Co.*, 365 Pa.Super. 74, 528 A.2d 1369, 1371 (1987). Notwithstanding such a fact, the appellants assert the indispensability of Waxman as a party to the suit denied the court below of jurisdiction to hear and enforce any matter attendant to the confession of judgment issue.

In this Commonwealth, the issue of failure to join an indispensable party cannot be waived; if such a party is not joined, a court is without jurisdiction to decide the matter. See *Nelson v. Dibble*, 353 Pa.Super. 537, 510 A.2d 792 (1986). In deciding whether a party is to be labelled indispensable, the following factors are utilized in the equation:

> 1) whether the party has a right or interest related to the claim; 2) the nature of the right or interest; 3) whether the right or interest is essential to the merits; and 4) whether justice can prevail without violating due process rights of the absent party.

---

[8]The appellants did so, however, by a petition to open or strike judgment filed May 10, 1989, and alleged therein that, inter alia, the appellees' failure to secure purported "permits" for and construct "roads" on the proposed shopping center site rendered the underlying "Bond and Warrant" with addendum unenforceable for lack of consideration. No mention was made at that time to the indispensability of Waxman to the suit so as to deprive the court below of jurisdiction to entertain the confession of judgment. Notwithstanding that fact, the petition was denied for the appellants' failure to assert "a meritorious defense." Lower Court Opinion, 7/14/89 at 3. No timely appeal was perfected from the July 14, 1989, order of court. In fact, the notice of appeal to Superior Court was filed *September 5, 1989*, well beyond the 30-day time-limit to attack a final order. See Pa.R.App.P. 903(a). This appeal was withdrawn, ultimately, on October 10, 1989. See note 7, supra and accompanying text.

Waksmunski v. Delginis, __ Pa.Super. __, __, 570 A.2d 88, 92 (1990) (Citations omitted); see also *Shields v. Barrow*, 58 U.S. (17 How.) 130, 139, 15 L.Ed. 158 (1855); 3A Moore, Federal Practice § 19.07.

At bar, our examination of the record reveals the absence of the factors necessary to establish the indispensability of Waxman as a party-plaintiff.

As is accurately observed by the appellees in their brief to us at pages 13 and 14:

> First, the instant action relates to the Bond and Warrant, or Note, executed by Oakwood as well as Aronow and Galioto individually. Judgment was entered on that Note in September, 1988. Contrary to Appellants' assertion, Mr. Waxman has no pecuniary interest in the Note, is not a party to that Note, nor was he assigned any interest in the Note by FL&S Associates. FL&S Associates hold[s] the only interest in that Note. [See Bond and Warrant RA 231a.] A separate action on the mortgage was filed at No. 88-2392 on October 31, 1988. That action filed by FL&S Associates relates to the mortgage on the Oakwood property and it is that mortgage in which FL&S Associates has assigned a 6 percent (6%) interest to Mr. Waxman in order to provide security for the payment of commissions that may be owed to Mr. Waxman by FL&S Associates in the event that FL&S Associates is paid the balance owed on the Note. As is apparent from the Addendum to the Mortgage (RA 226a), Mr. Waxman is merely an assignee of a portion of FL&S Associates' interest in the mortgage, and that assignment is to secure the payment of certain additional commissions when and

if they become due. [See Mortgage with attached Addenda RA 223a.]

Second, Appellants defaulted in the mortgage foreclosure proceeding and have never moved to open or vacate that Judgment and no appeal from that Judgment entered on December 7, 1988 has ever been filed. In short, Appellants[] have filed this Petition in the *wrong proceeding*. [Emphasis in original]

Additionally, the court below has written that:

Mr. Waxman is not an indispensable party since complete relief can be accorded among those already party to the action without his presence, and his absence will not impair or impede his ability to protect his interest, nor will it leave Defendants at risk of incurring double, multiple, or inconsistent obligations. *Gardner v. County of Allegheny*, 382 Pa. 88, 114 A.2d 491, 495 (1955). Mr. Waxman's interest in the mortgage was assigned by FL&S Associates solely to secure the payment of funds arising from the separate contractual relationship between Mr. Waxman and FL&S Associates.

Because Mr. Waxman's interest is in the mortgage and arises out of FL&S Associates[']' interest, and since Mr. Waxman's right to the payment of any additional funds relates to FL&S Associates' contractual obligation to him for additional broker's commissions, Mr. Waxman has no direct claim against the Defendants under the bond and warrant or otherwise. Not only is his presence not essential for granting relief in this matter, but it is wholly irrelevant and inappropriate in this action.

> Furthermore, Mr. Waxman is not an indispensable party to this action since his interest is in the mortgage and not the bond and warrant; and since that interest is not joint for purposes of Pa.R.Civ.P. 2227(a) ("persons having only a joint interest in the subject matter of an action must be joined on the same side as plaintiffs or defendants"). The addendum to the mortgage clearly states that FL&S Associates has *assigned* to Saul Waxman a 6% interest in the mortgage. It does not create a joint interest in the mortgage between the parties nor does it render Mr. Waxman an indispensable party to the present proceedings.

Lower Court opinion, 10/18/89 at 8-9 (Emphasis in original). We agree.

Because we hold that the court correctly found Waxman not to be an indispensable party to the lawsuit, this, of necessity, dispenses with the need to respond to the allegations of the appellants captioned Points III and IV in their appellate brief, both of which relate to Waxman and his purported status as an indispensable party and his failure to consent to the commencement of the present litigation.

The last contention relates to the supposed commission of error on the part of the court below in denying a stay of execution and holding the appellants in contempt for failing to comply with the execution procedures. See Appellants' Brief at 38.

Judge Grine, in his opinion, has artfully stated the case against the appellants' argument:

Defendants contend that because they have filed a Notice of Appeal, discovery in aid of execution should be stayed. However, Defendants have failed to comply with the Pa. Rules of Appellate Procedure in order to properly perfect the appeal or a supersedeas to stay discovery in aid of execution in this matter.

It is well-established that a prerequisite to the issuance of a supersedeas is the existence of a valid appeal. *See generally, Wilkinson v. United Parcel Service*, 158 Pa.Super. 34, 43 A.2d 414, 415 (1945). Only Defendants Aronow and Galioto have filed a Notice of Appeal. However, even Aronow and Galioto's Notice of Appeal of this Court's Order of July 14, 1989, was not filed until September 5, 1989, 53 days after the entry of the Order. Accordingly, the Notice of Appeal is untimely and cannot support the requested stay.

* * * *

Although Rule 1701 of the Pennsylvania Rules of Appellate Procedure states that the trial court no longer has jurisdiction in a matter after appeal has been taken, the exceptions to that rule provide that the trial court may continue to "enforce any order entered in the matter, unless the effect of the order has been *superseded* as prescribed in this chapter." This Court, therefore, retains jurisdiction to enforce its prior order of January 26, 1989, directing defendants to respond to discovery in aid of execution, absent an appropriate supersedeas issued by the Superior Court. This Court is empowered to enforce its orders, even after Notice of Appeal, by means of contempt. *See, Rosenberg v.*

Holy Redeemer Hosp., 351 Pa.Super. 339, 506 A.2d 408, 414 (1986).

* * * *

The Rules of Appellate Procedure require that Defendants properly perfect an application for supersedeas and file a bond with the appellate court in order to stay judgment or any post-judgment proceedings ancillary to judgment. *See, e.g.* Pennsylvania Rules of Appellate Procedure 1731-1738. The mere filing of an appeal does not automatically function as a supersedeas and stay the trial court's powers. *Shinn v. Stemler*, 47 A.2d at 295 (Defendant appealed Order denying Petition to O[pe]n Judgment. Court held Judgment not stayed by appeal). Defendants have neither requested a supersedeas nor filed any bond with the Superior Court.

* * * *

. . . Defendants have virtually no chan[c]e of success on the merits. As this Court determined, Defendants failed to demonstrate that they could fulfill the "meritorious defense" factors required to justify opening or striking a judgment. [See this Court's Order of July 14, 1989]. Accordingly, under any analysis, but especially under the no abuse of discretion standard applicable to Defendants' appeal, there is little likelihood that Defendants will prevail on appeal.

Inasmuch as the appeal filed by Aronow and Galioto is not only untimely, but is also without merit, a stay in this case would further prejudice Plaintiffs'

> attempts to execute on the judgment. The resulting detriment to Plaintiffs would be without reason and serve no legitimate purpose for Defendants' benefit, other than to continue to delay the enforcement of Plaintiffs' rights. Therefore, even if Defendants had properly requested a supersedeas and filed the appropriate security with the Court, they would not be entitled to a stay of discovery, or any other ancillary post-judgment proceeding of this Court.

Lower Court Opinion, 10/18/89 at 15-17.

We see no reason to alter the determination made by the court with regard to any of its rulings against the interest of the appellants. Accordingly, we will affirm its actions.

Orders affirmed.

MOMTGOMERY, J. Concurs in the Result.

DATED: JANUARY 15, 1991
JUDGMENT ENTERED

/s/Michael E. Williamson
DEPUTY PROTHONOTARY